

A Re Lim Ah Hee; ex p Perwira Affin Bank Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-03-51 OF 1997

SHAIK DAUD, SITI NORMA YAAKOB AND MOKHTAR SIDIN JJCA
18 FEBRUARY 2000

B

Bankruptcy — Notice — Amount of interest claimed incorrect — More than six years' interest claimed — Whether barred by s 6(3) of Limitation Act 1953 — Whether notice void ab initio — Limitation Act 1953 s 6(3)

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The respondent had through a civil suit obtained a final judgment against the appellant in October 1987. In March 1996, the respondent issued a bankruptcy notice against the appellant claiming the sum awarded under the final judgment plus interest, which notice the appellant applied to be set aside. The application and the appellant's subsequent appeal to the High Court were both dismissed. The appellant again appealed to this court, submitting that the interest claimed in the bankruptcy notice is barred by s 6(3) of the Limitation Act 1953 and, as such, the bankruptcy notice is void ab initio because the amount claimed exceeded the actual amount due.

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Held, allowing the appeal:

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The respondent is only entitled to claim six years' interest from the date of the judgment and a claim for interest exceeding six years nullifies the bankruptcy notice. The words 'no arrears of interest ... shall be recovered' in s 24(2) of the English Limitation Act 1980 (equivalent to s 6(3) of our Limitation Act 1953) should be given their ordinary meaning so as to bar execution after six years in respect of all interests. (see p 217B-D): *Lowsley & Anor v Forbes (t/a LE Design Services)* [1998] 3 All ER 897 followed; *WT Lamb & Sons v Rider* [1948] 2 KB 331 not followed.

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Obiter:

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There is no bar to the execution of a judgment after six years. The word 'action' in s 24(1) of the English Limitation Act 1980 (equivalent to s 6(3) of our Limitation Act 1953) means a fresh action, and does not include proceedings by way of execution. Accordingly, the section does not bar execution of a judgment after six years, but only barred the bringing of a fresh action on the judgment (see p 215F-H): *Lowsley & Anor v Forbes (t/a LE Design Services)* [1998] 3 All ER 897 followed; *WT Lamb & Sons v Rider* [1948] 2 KB 331 not followed.

H**I**

[Bahasa Malaysia summary]

Responden telah melalui suatu guaman sivil memperolehi penghakiman muktamad terhadap perayu pada Oktober 1987. Pada

bulan Mac 1996, responden mengeluarkan notis kebangkrapan terhadap perayu menuntut jumlah yang diawardkan di bawah penghakiman muktamad bersama-sama dengan faedah, di mana notis tersebut telah dipohon oleh perayu untuk diketepikan. Kedua-dua permohonan tersebut dan rayuan terkemudian perayu ke Mahkamah Tinggi telah ditolak. Perayu sekali lagi merayu kepada mahkamah ini, menghujahkan bahawa faedah yang dituntut di dalam notis kebangkrapan dihalang oleh s 6(3) Akta Had Masa 1953 dan, dengan itu, notis kebangkrapan tersebut adalah tak sah ab initio kerana jumlah yang dituntut telah melebihi jumlah sebenar yang kena dibayar.

Diputuskan, membenarkan rayuan tersebut:

Responden hanya berhak untuk menuntut faedah enam tahun dari tarikh penghakiman dan suatu tuntutan untuk faedah melebihi enam tahun membatalkan notis kebangkrapan tersebut. Perkataan-perkataan 'tiada tunggakan faedah ... boleh dituntut' di dalam s 24(2) Akta Had Masa Inggeris 1980 (bersamaan dengan s 6(3) Akta Had Masa 1953 kita) sepatutnya diberikan maksud biasanya agar menghalang pelaksanaan selepas enam tahun berkenaan dengan semua faedah-faedah (lihat ms 217B-D); *Lowsley & Anor v Forbes (t/a LE Design Services)* [1998] 3 All ER 897 diikuti; *WT Lamb & Sons v Rider* [1948] 2 KB 331 tidak diikuti.

Obiter:

Tidak terdapat halangan kepada pelaksanaan penghakiman selepas enam tahun. Perkataan 'tindakan' di dalam s 24(1) Akta Had Masa Inggeris 1980 (bersamaan dengan s 6(3) Akta Had Masa 1953 kita) bermaksud suatu tindakan baru dan tidak termasuk prosiding-prosiding melalui pelaksanaan. Dengan itu, seksyen tersebut tidak menghalang pelaksanaan penghakiman selepas enam tahun, tetapi hanya menghalang pembawaan tindakan baru di atas penghakiman (lihat ms 215F-H); *Lowsley & Anor v Forbes (t/a LE Design Services)* [1998] 3 All ER 897 diikuti; *WT Lamb & Sons v Rider* [1948] 2 KB 331 tidak diikuti.]

Notes

For a case on incorrect amount of interest claimed in a bankruptcy notice, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) para 1702.

Cases referred to

Lowsley & Anor v Forbes (t/a LE Design Services) [1998] 3 All ER 897 (folld)

Wangsini Sdn Bhd v Grand United Holdings Bhd [1998] 5 MLJ 345 (refd)

WT Lamb & Sons v Rider [1948] 2 KB 331 (not folld)

A Legislation referred to

Bankruptcy Act 1967 s 3(2)(ii)
Limitation Act 1953 (Act 254) ss 4, 6(3)
Limitation Act 1980 s 24 [Eng]
Rules of the High Court 1980 O 46 r 2(1)(a)

B Appeal from: Bankruptcy No D5-29-840 of 1996

M Manoharan (Karpal Singh & Co) for the appellant.

Lee Wooi Mien (Lee Yin Paik with her) (Shook Lin & Bok) for the respondent.

C Mokhtar Sidin JCA (delivering judgment of the court): Perwira Affin Bank Bhd (formerly known as Perwira Habib Bank Malaysia Bhd), the respondent in the present appeal, was the judgment creditor in the court below whilst the appellant, Lim Ah Hee, was the judgment debtor. On 28 March 1996, the respondent issued a bankruptcy notice against the appellant claiming the sum of RM6,388,344.68. This sum represented the amount due on a final judgment obtained by the respondent against the appellant in the High Court at Kuala Lumpur on 23 October 1987 vide Civil Suit No C-23-905-86. The appellant made an application to set aside the bankruptcy notice. On 19 March 1997, the senior assistant registrar dismissed the appellant's application with costs. The High Court dismissed the appellant's appeal. The appellant then appealed to this court.

E In the court below, counsel for the appellant raised two issues, namely:

(1) the respondent did not obtain leave of the court to execute the judgment after more than six years had lapsed from the date of the judgment pursuant to O 46 r 2(1)(a) of the Rules of the High Court 1980;

F (2) the respondent had incorporated in the bankruptcy notice statute barred interest and under s 6(3) of the Limitation Act 1953 (Act 254), the bankruptcy notice is void ab initio.

Before us, the same two issues were raised by the learned counsel for the appellant although he had in the High Court abandoned the first issue when he was satisfied that leave had been obtained under O 46 r 2(1)(a) of the Rules of the High Court. As such the learned judge only decided on the second issue.

Before us, counsel for the appellant submitted on both issues. We are not sure why counsel changed his stance. He went on to address us on the second issue first. He submitted that the interest claimed in the bankruptcy notice is barred by s 6(3) of the Limitation Act. As such the bankruptcy notice is void ab initio because the amount claimed exceeded the actual amount due. Section 6(3) of the Limitation Act makes the following provisions:

Limitation of actions of contract and tort and certain other actions

I (3) An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be

recovered after the expiration of six years from the date on which the interest became due.

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Counsel for the appellant relied on English authorities. The English provision equivalent to s 6(3) of the Limitation Act is s 24 of the English Limitation Act 1980 which provides as follows:

- (1) An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable.
- (2) No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

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The learned judge in the court below considered the case of *WT Lamb & Sons v Rider* [1948] 2 KB 331. In that case the Court of Appeal in its decision made a distinction between suing on a judgment and enforcing it. Relying on the judgment of Scott LJ at pp 337–338 in that case, the learned judge in the court below came to the following conclusion:

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The matter before me relates to bankruptcy action taken by the judgment creditor. In my view, going by the meaning of ‘writ of execution’ in O 46 r 1 of the Rules of the High Court 1980, bankruptcy actions do not come within the meaning of writ of execution and there may be no need even to get leave under O 46 r 2 to proceed with the bankruptcy actions. The issue of a bankruptcy notice is not a form of execution (see *Re A Bankruptcy Notice* (1898) at p 387) (at p 764 of the *Supreme Court Practice* 1997, vol 1).

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As seems clear to me that ‘action’ under s 6(3) of the Act does not cover execution proceedings and what more the bankruptcy actions, it follows therefore that the bankruptcy actions do not come within the ambit of s 6(3) of the Act and is therefore not applicable.

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As s 6(3) of the Act refers to ‘actions on judgments’ it would seem only sensible to interpret both limbs as applying in the same way, that is, confining to actions on judgments and excluding execution proceedings including bankruptcy actions. In my view the bankruptcy actions just like execution proceedings is the taking of a further step in an existing action rather than the commencement of a new action. In other words the bankruptcy actions do not operate on the concept of the cause of actions as is intended by the provisions of the Act.

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It was contended by the learned counsel for the appellant that the learned High Court judge had erred in his decision when he relied on the principles laid out in *WT Lamb*’s case. The learned counsel submitted that in view of the decision of the House of Lords in *Lowsley & Anor v Forbes (t/a LE Design Services)* [1998] 3 All ER 897 the principles laid out in *WT Lamb* is not good law anymore. When the learned judge of the High Court gave his decision, the case of *Lowsley* had not been decided yet and as such he did not have the benefit of that decision. When the learned judge gave his decision *WT Lamb* was still good law. It was subsequently overruled by *Lowsley*’s case. It is not fair for counsel to submit that the learned judge had erred. The law has changed in view of *Lowsley*’s case.

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Counsel for the appellant then cited the judgment of Lord Lloyd at pp 906–907:

A With regret, however, I cannot agree with the Court of Appeal on the second question. There would seem to be no reason why the relevant words in s 24(2) 'no arrears of interest ... shall be recovered' should not be given their ordinary meaning, so as to bar execution after six years in respect of all judgments. It is what the words say. 'Recovered' has a broad meaning. It is not confined to recovery by fresh action.

B But the Court of Appeal has held that the limitation to six years' interest on judgments applies only in a case of actions on judgments, and not to execution of judgments generally. In support of this construction, the Court of Appeal relied strongly on the fact that sub-ss (1) and (2) were part of the same sentence, joined only by a comma, when they were enacted as s 2(4) of the 1939 Act. If the first half of the sentence is confined to actions on judgments, Parliament must have intended that the second half of the sentence should be similarly confined. But in my view this does not follow as a matter of language. 'Any judgment' in the first half of the sentence means, quite literally, any judgment. There is no warrant for limiting 'interest in respect of any judgment debt' in the second half of the sentence to interest in respect of a judgment in an action on a judgment, even if one could think of any good reason why Parliament should so have provided.

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D Nor is the Court of Appeal's reasoning supported by the legislative history. If it is legitimate to go back to the 1939 Act in order to construe s 24(2) of the 1980 Act, then it is equally legitimate to go back to the 1833 Act, where, as has already been seen, the provisions which are now contained in s 24(1) and (2) were in separate sections, namely ss 40 and 42. Section 42 was a freestanding provision which limited the recovery of interest to a period of six years from when it became due. The provision was later applied to judgment debts carrying interest under s 17 of the Judgment Acts 1838.

E So as to the second question I prefer the decision of Tuckey J, who held that s 24(2) limits recovery by way of execution on all judgments to a period of six years, including the judgment in this case. ...

F It was held by the House of Lords that on its true construction, the word 'action' in s 24(1) of the 1980 Act means a fresh action, and did not include proceedings by way of execution. Accordingly, the section did not bar execution of a judgment after six years, but only barred the bringing of a fresh action on the judgment. However, there was no reason why the words 'no arrears of interest ... shall be recovered' in s 24(2) should not be given their ordinary meaning so as to bar execution after six years in respect of all interests. The House of Lords then went on to decide that the learned judge was right to reduce the interest and limit it to six years, and allowed the appeal to that extent.

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H In the present case we are of the opinion that counsel for the appellant was right when he submitted that the decision of *Lowsley* affected the decision of *WT Lamb* in that though there is no bar in the execution of a judgment after six years, the recovery of interest is limited to six years only. In view of this the decision of the learned judge relying on the decision of *WT Lamb* cannot be upheld.

I From the authorities it is clear that the local courts had followed the decision of *Lowsley*'s case in respect of limitation to interest. In *Wangsimi Sdn Bhd v Grand United Holdings Bhd* [1998] 5 MLJ 345, it was held that s

6(3) of the Limitation Act 1953 will have a telling effect on the statutory notice of demand as the petitioner is only legally entitled to claim interest on the judgment in default obtained on 19 January 1990 for six years from the date on which the interest became due. It is clear from this authority that a bankruptcy notice cannot claim interest exceeding six years on a judgment obtained. It is also clear that a claim for interest exceeding six years will nullify the bankruptcy notice.

Counsel for the respondent submitted that the appellant had filed two applications which were dismissed by the senior assistant registrar. Being dissatisfied with that decision, the appellant then appealed to the judge in chambers. Before the appeal could be heard on its merits, counsel for the appellant raised two preliminary issues. Counsel for the respondent further submitted before the learned judge, the appellant abandoned the first issue but proceeded with the second issue. The learned judge then went on to decide on the second issue against which decision the appellant is now appealing. Counsel for the respondent contended that it was not proper for the appellant to raise the first issue since he had abandoned it at the High Court. We agree with the respondent that it is not proper for the appellant to raise the first issue before us since it was abandoned in the High Court. As such we made it clear that we will only consider the second issue which is in respect of limitation of interest.

In respect of this issue counsel for the respondent voiced her objection on the way the appellant raised the issue before the learned judge because it did not conform to s 3(2)(ii) of the Bankruptcy Act 1967 where a seven-day notice must be given after receipt of the bankruptcy notice. The bankruptcy notice was served on 3 June 1996 and the issue was raised only on 7 May 1997. This issue was raised as a preliminary objection. From the record before us it is clear that counsel for the respondent did not raise any objection to the issue being raised before the learned judge. The learned judge then went on to hear the arguments and then made his ruling. It is too late for the respondent to raise this objection before us. Anyway, this is a point of law which in our opinion could be raised at any time. Failing on this objection, counsel for the respondent submitted that the appellant should plead that issue as a defence as required by s 4 of the Limitation Act. Again, from the record it is clear that counsel for the respondent did not raise her objection or argue this objection before the learned judge. As such it is too late for her to raise it now. In fact she allowed the judge to hear the arguments on the issue of limitation raised by the appellant, who made a ruling on it in favour of the respondent.

In respect of the issue itself, counsel for the respondent submitted that the learned judge came to the correct conclusion when he made a ruling that the limitation is not applicable to the interest claimed in the present appeal. Counsel submitted further that the Limitation Act is not designed nor intended by Parliament, inter alia, for the purpose of calculating the amount of interest due under a judgment in a bankruptcy notice. The Limitation Act is aimed at providing a timeframe for commencing suits or actions and not for quantification purposes. She went on to say that the appellant's argument that the respondent could only claim interest for six years

- A** calculated backwards from the date of filing of the bankruptcy notice was wrong. The correct interpretation of the second limb of s 6(3) of the Limitation Act concerns post judgment interest and not the award of interest up to the date of judgment (pre-judgment interest) as the latter together with the principal sum awarded in the judgment themselves constitute the judgment debt. Any interest due after the date of judgment is
- B** limited to six years and a creditor can recover it by way of a fresh action.

- The learned judge made his ruling only in respect of the second limb whereby he decided that there is no limitation to interest claimed because of the decision in *WT Lamb*. Since *WT Lamb* had been overruled by *Lowsley's* case under the law as it is now, a judgment creditor can only claim
- C** interest on a judgment sum not exceeding six years from the date it is due. In the present case the respondent is only entitled to claim six years interest from the date of judgment.

- The present appeal is only in respect of the ruling made by the learned judge on limitation of interest to be claimed. We are not sure whether the bankruptcy notice included a claim of interest exceeding the limitation
- D** period. If it is so then the bankruptcy notice is void.

For the above reasons we allowed the appeal by the appellant with costs here and below with the deposit to be refunded to the appellant.

- E** *Appeal allowed.*

Reported by Joel Ng

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